Supreme Court, U.S.
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No. 98-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIE J. DUNN,

Petitioner,

vs.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This action was originally commenced by the filing of Petitioner's Complaint in the Circuit Court of Madison County, Alabama on August 4, 1994. (R.4-15). On September 1, 1994, Respondents removed this action to the United States District Court for the Northern District of Alabama. (R.16-35). On October 3, 1994, the United States District Court dismissed all of Petitioner's federal procedural due process claims and remanded the remaining state law claims to the Circuit Court for Madison County, Alabama. (R.36-44).

On December 5, 1994, Petitioner filed his amendment to the Complaint. (R.62-71). On September 6, 1996, Respondents filed their Motion for Summary Judgment. (R.123-126). Respondents' Motion for Summary Judgment was granted on April 16, 1997. (R.357-363). The Petitioner appealed the grant of summary judgment to Respondents to the Alabama Court of Civil Appeals. The Alabama Court of Civil Appeals upheld the decision of the trial court on February 27, 1998. Petitioner's petitioned for rehearing before the Alabama Court of Civil Appeals, which was denied, and then petitioned for a Writ of Certiorari to the Alabama Supreme Court. Petitioner's writ was denied. Petitioner has now petitioned for Writ of Certiorari to this Honorable Court.

FACTUAL BACKGROUND

Petitioner, Willie J. Dunn (hereinafter "Dunn"), was initially employed by Alabama Agricultural and Mechanical University (hereinafter the "University") on January 17, 1989 as Coordinator of Testing. (R.120). Dunn's title was latter changed to Director of Testing Services. (R.120). Dunn's duties as Director of Testing included overseeing the administration of various tests given to the University's students, the principal

one of which was the administration of the ACT (American College Testing)[1] Assessment to incoming freshmen. Dunn was also responsible for the storage and safekeeping of those test results so that they would be available for research purposes. In addition to the ACT Assessment tests, the University's testing services also began the administration of another ACT test, the CAAP (Collegiate Academic Assessment Program). (R.120-121).

On February 12, 1992, Dunn was notified by ACT that it was terminating its relationship with him and that he could not be involved "in any capacity" with the administration of ACT Assessment tests. The University was advised that Dunn's relationship with ACT was terminated due to his failure to cooperate with the ACT's investigation of a testing irregularity which occurred in one of the tests Dunn administered at the University. (R.121).

In May of 1993 Dunn was notified by his Supervisor, Dr. Fran Johnson, that she was recommending his termination. One of Dr. Johnson's reasons for recommending termination was that Dunn was "unable to perform the full range of duties and responsibilities of the position because ACT has terminated its relationship with him." The ACT termination created the consequence that Dunn could not administer the Residual ACT Assessment that the University uses for admission and placement of entering freshmen, maintain ACT student profile sheets and respond to inquiries about student performance on the ACT/Residual ACT, administer any ACT-sponsored test, including the Collegiate Academic Assessment Program (CAAP) which is used to assess the effectiveness of the general (core) education curriculum, and service the Huntsville-Madison County community by administering the ACT to high

1. ACT is the national organization which provides standardized testing for colleges and universities.

school students. Dr. Johnson's second reason for recommending termination was that the quality of Dunn's work performance, his attitude toward the duties and responsibilities of his position, and his interactions with co-workers had deteriorated and was unacceptable. (R.121).

Dunn appealed Dr. Johnson's recommendation to Dr. Virginia Caples, the then Vice-President for Academic Affairs. Dr. Caples upheld Dunn's termination. However, Dr. Caples changed the effective date of the termination from June 1, 1993 to July 1, 1993. Dunn was notified of Dr. Caples decision by letter dated June 9, 1993. (R.122). Dunn chose to exercise his right to utilize the University's grievance process and on June 15, 1993, Dunn filed a grievance relating to his termination. (R.106)

Under the University's grievance process a staff member can contest an adverse employment action by filing a grievance and requesting a hearing before the grievance committee. (R.105). At the grievance hearing the staff member has

> the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and examine all documents and other adverse demonstrative evidence.

(R.106). The grievance hearing is not governed by formal rules of evidence. A list of witnesses to be heard is submitted to all parties ten days in advance of the hearing. (R.106).

The University's grievance process is an administrative remedy provided its employees by the University. The hearings are not intended to be conducted as formal trials. The University has consistently interpreted its Staff Handbook and policy as

allowing the employee to have counsel present with him during the hearing. The employee is free to consult with the attorney, however, the attorney is not allowed to personally participate in the hearing.[2] (R.106).

The grievance committee then issues its recommendation to the University's President within ten (10) working days from the conclusion of the hearing. (R.107). The recommendation of the grievance committee is final unless the President alters or rescinds the committee's recommendations within ten (10) working days of his receipt of the recommendation. (R.107).

A grievance hearing was held for Dunn on October 15, 1993. The members of the Grievance Committee which heard Dunn's grievance were Dr. James Thompson, Joe Hudson and Herman Mixon. (R.107).

Despite the fact that adverse witnesses were to be presented against Dunn, no list of witnesses was provided to Dunn prior to the hearing. (R.107). At the beginning of the hearing, Dunn's counsel advised the Grievance Committee that no list of witnesses had been provided. Dunn's counsel advised the Grievance Committee that regardless of this fact, Dunn wanted the hearing to proceed. (R.129). Dunn's attorney was present at the hearing and was allowed to make an opening and closing statement. (R.128). Dunn was also permitted, with his counsel's assistance, to cross-examine the adverse witnesses presented. (R.128).

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2. The only known exception to this policy arose when a faculty member filed a grievance but was incarcerated at the time of his scheduled grievance hearing. Due to the special circumstances surrounding that situation, the University permitted the employee's attorney to stand in for him at the hearing. However, when the employee was granted a second hearing after his incarceration had ended, his attorney was not permitted to participate in that hearing. (R.106-107.)

Under the University's grievance procedure, the Hearing Committee is to render its findings and recommendations to the President within ten (10) working days following the hearing. (R.107). On October 22, 1993, as the result of a two (2) to one (1) vote, the Hearing Committee issued its recommendation that Dunn be reinstated to a comparable position and that he be paid back wages. (R.107). This recommendation was sent to the Director of Human Resources. (R.107-108). By letter dated November 2, 1993, Lois Thompson, Director of Human Resources, forwarded the recommendation of the Grievance Committee to the University's President, Dr. David Henson. (R.108).

The letter and recommendation were received in Dr. Henson's office on November 10, 1993. (R.45). Bessie Gibbs had the responsibility for receipt of written communications in the President's office directed to the President. (R.46). It is her normal practice and procedure to date stamp an item of correspondence on the day on which it is received by the President's office and to record the fact of receipt into a chronological log which she maintains on behalf of the President. (R.46). Ms. Gibbs received the Hearing Committee's recommendation by transmittal from Lois Thompson, the Director of Human Resources for the University, on November 10, 1993. (R.46). The grievance procedure provides that the President has ten (10) working days after his receipt of the grievance committee's recommendation to issue his decision, otherwise the recommendation of the committee becomes final. (R.107). On November 18, 1993, Dr. Henson issued his decision that he was rejecting the grievance committee's recommendation and upholding Dr. Johnson's original recommendation to terminate Dunn. (R.108).

Dr. Henson determined that it was in the best interest of the University to uphold Dunn's original termination. Dr.

Henson's decision was in no way based on the fact that only two of the three panel members had recommended reinstatement. It would have made no difference to Dr. Henson's decision making process if all three panel members had recommended reinstatement. (R.103). A copy of Dr. Henson's decision was forwarded to Dunn by Lois Thompson. (R.108). No member of the University's Board of Trustees was involved at any stage of this process, and took no action of any kind concerning Mr. Dunn. No relief or action was ever requested of the Board of Trustees. (R.108).

Dunn's original complaint attempted to state four (4) separate counts upon which Dunn sought to base his reinstatement to the University and an award of backpay and other damages. Counts I and II sought to assert a claim of violation of Dunn's procedural due process rights based upon the hearing Committee's alleged failure to follow the University Staff Handbook by refusing to allow Dunn unfettered right to counsel during his grievance hearing (Count I) and failing to provide Dunn with a list of witnesses which would be testifying against him prior to the grievance hearing (Count II). (R.8-10). The alleged constitutionally protected property interest of which Dunn claims he has been deprived without due process is his employment at the University.

In Count III Dunn alleged that the Staff Handbook establishes a period of ten (10) working days from the date on which the findings and recommendations of the Hearing Committee are received by the President of the University within which the President must act or such findings and recommendations become final and cannot thereafter be altered by the President. Dunn alleges that the period of ten *working* days expired before Dr. Henson, the University's President, took action to alter or rescind the Hearing committee's recommendation that Dunn be restored to a position comparable

to his former position and that he be paid back wages based on his period of termination. The University was alleged to have failed and refused to comply with the ten working day policy. Dunn gave no indication of the legal theory upon which he based his request for relief in Count III. (R.10).

With regard to each of the first three counts, Dunn sought a monetary judgment "against Defendants . . . in an amount equal to the amount of his lost wages plus interest and costs", and sought a declaration and Writ of Mandamus reinstating him at the University. Dunn also sought an award of attorney's fees. (R.8-10).

Count IV was allegedly asserted

> under the Fourteenth Amendment to the Constitution of the United States; under 42 U.S.C. Section 1983; and under the Alabama constitution of 1901, Article I, Sections Six and Thirteen

based upon an alleged violation of Dunn's due process rights. (R.11). The factual allegations upon which Count IV was based are essentially identical to and a combination of Counts I, II and III. (R.11). Count IV expressly sought judgment against "Defendants in their official and individual capacities" for compensatory damages

> in an amount equal to the amount of his lost wages plus interest and costs, or, in the alternative, a declaratory judgment and relief in the nature of a Writ of Mandamus declaring that Plaintiff has been deprived as alleged herein.

(R.12). Dunn also sought an award of punitive damages and attorney's fees in Count IV.

Named as Defendants in this action were University; David B. Henson, individually and in his official capacity as President of the University (hereinafter "Dr. Henson"); Governor James E. Folsom, Jr., Chris McNair, Cliff Walker, Sage Lyons, Jr., John Stallworth, Oscar D. Tucker, Richard D. Davis, Elliot Maisel, Betty M. Brady, Franklin Perry, Sr., G.W. Ponder, Edwin Hill and Malcolm Speller, individually and in their official capacities as members of the Board of Trustees of the University (hereinafter collectively referred to as the "Trustees"); Herman Mixon, James Thompson and Joe Hudson, individually and in their official capacities as member of the grievance committee which heard Dunn's grievance.

REASONS FOR DENYING THE WRIT

I.

DUNN'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ALABAMA COURT OF CIVIL APPEALS AND ANY DECISION RENDERED BY THIS COURT.

Contrary to Dunn's assertions, there is no conflict between any decision of the Alabama Court of Civil Appeals and prior decisions of this Court. Dunn's original complaint contained four claims. Counts I and II were due process claims brought pursuant to the Alabama Constitution. Count III was a state law quasi-contract claim and Count IV was a procedural due process claim under the Fourteenth Amendment to the United States Constitution brought pursuant to 42 U.S.C. § 1983. The allegations of Count IV were simply a compilation of the same allegations set out in Counts I through III. (R.4-15). After the filing of Plaintiff's Complaint, the Defendants removed the case to the United States District Court for the Northern District of

Alabama. The United States District Court dismissed all of the Plaintiff's federal claims[3] under the authority of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). (R.37-39). Under *McKinney*, an available and adequate remedy under state law to redress the procedural deprivation allegedly suffered determines whether the plaintiff has a maintainable claim under § 1983 for deprivation of rights to procedural due process. The United States Court of Civil Appeals for the Eleventh Circuit stated in *McKinney* that:

> As we mention above, unlike substantive due process violations, procedural due process violations do not become complete "unless and until the state refuses to provide due process." *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983. More specifically, in the case of an employment termination case, "due process [does not] require the state to provide an impartial decision maker at the pre-termination hearing. The state is obligated only to make available 'the means by which the employee can receive redress for the deprivations.' " *Schaper v. City of Huntsville*, 813 F.2d 709, 715-16 (5th Cir. 1987) (quoting *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981)) (footnote omitted).

McKinney, 20 F.3d at 1562-63. In the District Court's Memorandum of Opinion, the court noted that Dunn had adequate remedies available to him under state law and that Dunn had not expressed any dissatisfaction with the adequacy of those remedies. (R.38). Dunn's remaining state law claims were remanded to the Circuit Court for Madison County, Alabama. (*Id.*).

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3. The District Court held that, to the extent Counts I and II attempted to assert federal due process claims, those claims were also dismissed. (R.38.).

Thereafter Dunn amended his complaint. Dunn's amended complaint added additional factual detail as well as asserted, as Count V, a new state-law quasi-contract claim. The amended complaint also replead the identical federal claim which had previously been dismissed by the District Court. The Defendants moved for summary judgment as to all of the claims asserted by Dunn in the Amended Complaint. In granting summary judgment to the Defendants on all claims, the Circuit Court of Madison County inadvertently stated that it was dismissing the Petitioner's federal claim on the basis that, as it had previously been dismissed by the United States District Court, the claim was now barred by res judicata. The Circuit Court went on to say that alternatively this claim was dismissed based on the same rationale as set forth by the United States District Court. (R.360). The Alabama Court of Civil Appeals, in upholding the Circuit Court's decision, noted the Circuit Court's inaccurate use of the term res judicata, but also pointed out that the decision could be affirmed as the court reached the correct result, even if it gave the wrong reason. (A.11).

With that background in mind, it is clear from a review of Dunn's petition that he does not understand the basis for the dismissal of this claim. Dunn's argument does not address whether under federal law he has stated a claim under 42 U.S.C. § 1983 for violation of his right to procedural due process. Dunn, instead, argues to this Court that certiorari should be granted because he claims that a genuine issue of material fact existed such that it was inappropriate for the Circuit Court to grant summary judgment. Dunn then attempts to reargue what he considers to be the summary judgment issues. As set out above, the Circuit Court did not address any factual issues with regard to Dunn's claim under § 1983. Both the United States District Court and the Madison County Circuit Court found that Dunn had failed to state a claim under § 1983.

The decision of the District Court and the Madison County Circuit Court is consistent with the rulings of this court and thus, there is no conflict in this case between the opinion of the Alabama Court of Civil Appeals and any opinion rendered by this or any other federal court. Rather, the Alabama Court of Civil Appeals agreed with the opinion of the United States District Court that Dunn had failed to state a claim under 42 U.S.C. § 1983 for violation of his procedural due process rights.

II.

CERTIORARI SHOULD BE DENIED TO THE EXTENT PETITIONER SEEKS A REVIEW BY THIS COURT OF WHETHER THE EVIDENCE BEFORE THE CIRCUIT COURT SUPPORTED THE GRANT OF SUMMARY JUDGMENT TO THE RESPONDENTS.

Dunn asks that this Court re-examine the evidence presented to the Circuit Court and make an independent determination as to whether or not that evidence sufficiently supported the Circuit Court's decision to grant summary judgment to the Respondents. It is well settled that, absent a showing of obvious error, it is not the province of this Court to review the factual findings of a state court when there is no federal question at issue. *American Radio Association v. Mobile S. S. Association*, 95 S. Ct. 409 (1974). The factual findings of the Madison County Circuit Court were reviewed by the Alabama Court of Civil Appeals, which upheld those findings. Dunn has not alleged that some type of extraordinary error exists, he merely disagrees with the findings of the Circuit Court and would have this Court reach a different result.

Further, in his argument, Dunn points the Court to several "facts" which he contends show that there were genuine facts in dispute. Dunn neglects to mention that the "evidence" which

he now offers to show that genuine issues of material fact exist, was found by the Circuit Court to be inadmissible and was not even offered to the Circuit Court until after summary judgment had been granted for the Respondents. (R.506-507).

There is no reason or basis for this Court to undertake a review of the factual findings of the Circuit Court, thus, Dunn's writ is due to be denied.

III.

CERTIORARI SHOULD BE DENIED AS THE REMAINING CLAIMS SOUGHT BY DUNN TO BE REVIEWED INVOLVE NO FEDERAL QUESTION OR ISSUE AND CONCERN PURELY STATE-LAW ISSUES.

It is fundamental to a determination of whether a petition for writ of certiorari to the United States Supreme Court should be granted, that the petition set forth an issue of federal law. *Maryland and Virginia Eldership of the Churches of God, et al. v. The Church of God at Sharpsburg, Inc., et al.*, 90 S. Ct. 500 (1970). Dunn has attempted to transform what were almost exclusively Alabama state-law claims, into questions of federal law.

The third issue raised by Dunn's petition is

> [w]hether under the Due Process Clause of the 14th Amendment to the U.S. Constitution petitioner had a constitutional right to notice that he would not be represented by counsel; no list of witnesses would be provided; and the President of the University would not abide by Staff Handbook?

(Pet. i). In addition to originally asserting that these alleged actions were violations of his procedural due process rights pursuant to § 1983, Dunn also contended that these actions violated his rights under the Constitution of the State of Alabama. As set out above, the Circuit Court did not reach any factual issues with regard to Dunn's § 1983 claim and properly dismissed it for its failure to state a claim under federal law. Both the Circuit Court and the Court of Civil Appeals found that Dunn's rights to due process under the Alabama Constitution had not been violated. Thus, there remains no federal issue for this Court to review.

Similarly, the fourth issue raised by Dunn's petition is

> [w]hether provisions stated in Staff Handbook signed for by petitioner detailing termination rights combined with a contract of continued employment may rise to the level of a unilateral contract?

(Pet. i). Whether the University's Staff Handbook and some alleged contract of continued employment created a contract, is an issue of purely state law. Dunn's quasi-contract claims raise no issue of federal law. Indeed, the only case cited by Dunn in support of his position that the University's handbook somehow created a contract between himself and the University, is a case decided by the Alabama Supreme Court, *Hoffman-LaRoche, Inc., v. Campbell*, 512 So. 2d 725 (Ala. 1987). Dunn does not contend that this Alabama Supreme Court case conflicts with any decision of this Court, rather, Dunn offers it in support of his position that a contract existed. After making the argument for the existence of a contract between himself and the University, Dunn then concludes his argument by asking this Court "to grant certiorari to determine whether the Due Process Clause of the 14th Amendment to the U.S. Constitution protects rights stated in Staff Handbook." (Pet. 17). Though he

attempts to articulate these claims as federal questions, Dunn is actually asking this Court to find that a state law contract existed. Dunn then asks that this Court find that his interpretation of the University's Staff Handbook is correct and that the University, thus, breached that contract. As these claims present no federal questions for this Court to review, Dunn's petition for writ of certiorari is due to be denied.

IV.

DUNN SHOULD NOT BE PERMITTED TO ASSERT, FOR THE FIRST TIME, A NEW CLAIM IN HIS PETITION FOR WRIT OF CERTIORARI.

In addition to attempting to recreate his state-law claims as federal claims, Dunn also has plead a claim to this Court which was never asserted in either his original or amended complaint. In the questions presented by Dunn for this Court to review, the last question is

> [w]hether false changes [sic] against petitioner have irreparably damaged his good name, professional reputation and deprived he of the right to a livelihood in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution?

(Pet. i-ii). In his argument, Dunn attempts to characterize this "claim" as a stigmatization claim, however, at no point, prior to its appearance in his Petition, has Dunn ever asserted this claim. A petitioner cannot assert a new claim in his petition for writ of certiorari. *Taylor v. Freeland & Kronz, et al.*, 112 S. Ct. 1644, 1649 (1992). As this claim was never plead by Dunn in either his complaint or amended complaint, his petition for writ of certiorari as to this claim, is due to be denied.

CONCLUSION

For the reasons set out hereinabove, petitioner's writ is due to be denied in its entirety.

Respectfully submitted,

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